COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 039231-98**

Kenneth B.Valler	Employee
K. Trucking & Sons, Inc.	Employer
Eastern Casualty Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy & Costigan)

APPEARANCES
Robert F. Gabriele, Esq., for the employee
John A. Smillie, Esq., for the insurer

CARROLL, J. The insurer appeals from a decision in which an administrative judge concluded that the employee was entitled to permanent and total incapacity benefits as of October 9, 2000, a date the insurer claims to be without evidentiary significance. See Carter v. Shaughnessy Kaplan Rehab Hosp., 9 Mass. Workers' Comp. Rep. 437, 447-448 (1995). We agree. However, since the adopted medical evidence supports the award of § 34A benefits as of the exhaustion of § 34 temporary total incapacity benefits on January 8, 2002, recommittal is unnecessary. See Roney's Case, 316 Mass. 732, 739 (1944). We reverse the decision in part and order that § 34A benefits commence as of January 8, 2002.

The employee fractured a bone in his left foot on October 8, 1998, which injury the insurer accepted. (Dec. 3; Employee Ex. 3.) The injury led to a fusion of his subtalar joint and eventual removal of screws from the fusion, as well as posttraumatic arthritic change in his ankle joint. (Dec. 4-5; Employee Ex. 3.) The parties stipulated to pertinent dates in the protracted litigation of this matter. Those that are relevant to the present discussion are the following. On February 24, 2001, the impartial physician first examined the employee. This medical examination stemmed from the insurer's appeal of a conference order denying its

complaint for discontinuance of § 34 benefits. The hearing took place on July 25, 2001. On January 8, 2002, before the decision rendered, the employee's § 34 benefits exhausted. The August 9, 2002 hearing decision resulted in a large overpayment, and the insurer filed for recoupment on August 16, 2002. At the § 10A conference on that request, the employee moved to join a claim for § 34A benefits. The conference order, dated April 8, 2003, denied recoupment, allowed the joinder of the § 34A claim and denied payment of § 34A benefits. Both parties appealed. The same impartial physician re-examined the employee again on June 15, 2003. (Joint Stipulation of the Parties of Chronology.)

The administrative judge awarded § 34A benefits that, in effect, eliminated the insurer's recoupment claim. (Dec. 5.) October 9, 2000 was the date set for commencement of those benefits. (Dec. 7.) The insurer contends that this date has no evidentiary value. The employee counters that the date is a scrivener's error, and should have been October 9, 2001- three years post-injury in recognition of the statutory maximum period of benefit entitlement under § 34.

Both parties are correct to an extent. While the October 9, 2000 commencement date is obviously incorrect, we do agree with the employee that it indicates that the judge meant to award § 34A benefits as of the exhaustion of the three-year § 34 entitlement, which otherwise would have been October 9, *2001*. However, the judge failed to realize that § 34 benefits did not actually terminate exactly three years after the date of injury. As noted above, the exhaustion date was stipulated to be January 8, 2002.

The only question that remains is whether the adopted medical evidence of the impartial physician supports the award of permanent and total incapacity benefits as of January 8, 2002. We consider that it does. In his February 24, 2001 report, the doctor opined that the employee's disability status was permanent and partial, but with no chance of returning to long haul truck driving. The doctor also felt that the employee was at a medical end result, barring his election to pursue a particular surgical course. (Dec. 4; Employee Ex. 3.) In his second report, dated

June 15, 2003, the impartial physician indicated that, upon re-examination, the employee's condition had deteriorated. (Dec. 4-5.) The judge apparently considered the employee's vocational profile supportive of an award of total incapacity benefits based on a partial medical disability. See Scheffler's Case, 419 Mass. 251 (1994). Because the insurer does not now argue that the § 34A award is unsupported, we think the actual exhaustion date is the only appropriate date in the evidence for the commencement of such permanent and total incapacity benefit payments. See Hovey v. Shaw Industries, 16 Mass. Workers' Comp. Rep. 136 (2002).

Accordingly, we reverse the decision in part and order that § 34A benefits be paid as of January 8, 2002. We otherwise affirm the decision.

So ordered.

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Martine Carroll
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **October 19, 2005**

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Patricia A. Costigan
Administrative Law Judge